

Shen Lincoln-Mercury-Mitsubishi, Inc., and Shen Chevrolet Geo, Inc., d/b/a Shen Automotive Dealership Group and International Association of Machinists and Aerospace Workers Peninsula Lodge 1414, International Association of Machinists and Aerospace Workers, AFL-CIO. Case 20-CA-26259

June 28, 1996

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND FOX

On November 3, 1995, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The General Counsel and the Respondents filed exceptions and supporting briefs. The Respondents filed a brief in opposition to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions,² as modified, and to adopt the recommended Order³ as modified and set forth in full below.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set out in full below and orders that the Respondents, Shen Lincoln-Mercury-Mitsubishi, Inc., and Shen Chevrolet Geo, Inc., d/b/a Shen Automotive

¹ The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Although the judge found that the Respondents had unlawfully stopped various fringe benefit contributions and recommended an appropriate remedy and notice, she inadvertently failed to reflect that in her recommended Order. We will modify the Order accordingly.

² We find it unnecessary to pass on the judge's finding that Parts Manager Walter Preusse unlawfully interrogated employee Charles David Morgan about whether Morgan had a grievance pending with his prior employer. Preusse is not specifically alleged to be a supervisor or agent of Respondents, and the finding of another interrogation would be cumulative and would not materially affect our remedy.

We reverse the judge's finding that David Wade's agency for purposes of soliciting statements from employees that they no longer desired union representation "logically extends" to Wade's statements to employee Morgan more than 3 months after the withdrawal of recognition. Accordingly, we find that these statements did not violate Sec. 8(a)(1) by threatening retaliation for union activity and giving the impression that union meetings were the subject of surveillance by the Respondents.

³ We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

Dealership Group, San Mateo, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Cease and desist from

(a) Impliedly threatening an employee by telling him that he had to choose between the Respondents and the Union but could not remain neutral; promising employees that they would be paid more if they decertified the Union; interrogating employees about union activities in the shop; assisting employees in their withdrawal of membership from the Union; and soliciting employees to sign antiunion statements.

(b) Suspending Noel Kohler because Kohler engaged in activities on behalf of International Association of Machinists and Aerospace Workers Peninsula Lodge 1414, International Association of Machinists and Aerospace Workers, AFL-CIO, and/or concerted activities, and to discourage employees from engaging in these activities.

(c) Failing and refusing to bargain with the Union as the exclusive bargaining representative of its employees in the following appropriate unit: All employees of Respondents covered by the terms of the collective-bargaining agreement between the Peninsula Bargaining Unit and the Union in effect from July 16, 1989, and July 15, 1993.

(d) Withdrawing recognition from the Union and ceasing payment of employee health and welfare contributions, pension contributions, and supplemental employee disability benefits without bargaining with the Union to a good-faith impasse and without the Union's agreement.

(e) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain with the Union as the exclusive representative of the employees in the above unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) On request of the Union, rescind any or all of the changes it has unilaterally implemented based on its unlawful withdrawal of recognition from the Union on August 12, 1994.

(c) Resume payment of employee health and welfare contributions, pension contributions, and supplemental employee disability benefits, and make whole the appropriate funds by paying all delinquencies which have accrued with interest, and make whole employees for any losses due to its failure to make these contributions, with interest.

(d) Make whole Noel Kohler for any loss of earnings and other benefits suffered as a result of the un-

lawful suspension in the manner set forth in the remedy section of the judge's decision.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension of Noel Kohler, and within 3 days thereafter, notify Kohler in writing that this has been done and that the suspension will not be used against him in any way.

(f) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facilities in San Mateo, California, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facilities involved in these proceedings, the Respondents shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since August 22, 1994.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certificate of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT solicit employees to sign a statement to decertify International Association of Machinists and Aerospace Workers Peninsula Lodge 1414, International Association of Machinists and Aerospace Workers, AFL-CIO.

WE WILL NOT impliedly threaten an employee by telling him he had to choose between us and the Union but could not remain neutral.

WE WILL NOT promise employees that they will be paid more if they decertify the Union.

WE WILL NOT interrogate employees about union activities in the shop.

WE WILL NOT assist employees in their withdrawal of membership from the Union.

WE WILL NOT fail and refuse to bargain with the Union as the exclusive bargaining representative of our employees covered by the terms of the collective-bargaining agreement between the Peninsula bargaining unit and the Union in effect from July 16, 1989, through July 15, 1993.

WE WILL NOT withdraw recognition from the Union and cease payment of employee health and welfare contributions, pension contributions, and supplemental employee disability benefits without bargaining with the Union to a good-faith impasse and without the Union's agreement.

WE WILL NOT suspend Noel Kohler or any other employee because of activities on behalf of the Union and/or because of protected concerted activities and to discourage other employees from engaging in these activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request of the Union, rescind any unilateral changes made in the terms and conditions of employment from those set forth in the last collective-bargaining agreement.

WE WILL recognize and, on request, bargain in good faith with the Union, as the representative of our employees, and embody any agreement reached in a written contract.

WE WILL resume payment of employee health and welfare contributions, pension contributions, and supplemental employee disability benefits, and make whole the appropriate funds by paying all delinquencies which have accrued with interest and by making whole employees for any losses due to our failure to make these contributions, with interest.

WE WILL rescind our suspension of Noel Kohler and WE WILL make him whole, with interest, for any loss of pay or benefits suffered by reason of the suspension.

WE WILL, within 14 days from the date of the Board's Order, remove from all personnel files any reference to our unlawful suspension of Noel Kohler and WE WILL, within 3 days thereafter, notify him in writing that we have removed these materials from our files and that the suspension will not be used against him in any way.

SHEN LINCOLN-MERCURY-MITSUBISHI,
INC., AND SHEN CHEVROLET GEO, INC.,
D/B/A SHEN AUTOMOTIVE DEALERSHIP
GROUP

Lucile L. Rosen, Esq., for the General Counsel.
Joseph P. Ryan, Esq. (Littler Mendelson, Fastiff Tichy & Mathiason), of San Francisco, California, for the Respondent.
David Rosenfeld, Esq. (Van Bourg, Weinberg, Roger & Rosenfeld), of San Francisco, California, for the Charging Party.
Donald Barbe, Business Representative, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARY MILLER CRACRAFT, Administrative Law Judge. This case was tried in San Francisco, California, on February 23 and 24, March 8 and 9, 1995. The charge was filed on August 22, 1994,¹ and a first and second amended charge were filed on September 19 and November 28, respectively. The complaint, issued December 16, alleges that Shen Automotive Dealership Group (the Respondents or Shen) unlawfully withdrew recognition from International Association of Machinists and Aerospace Workers Peninsula Lodge 1414, International Association of Machinists and Aerospace Workers, AFL-CIO (the Union) and unilaterally ceased paying employee health and welfare contributions, pension contributions, and supplemental employee disability benefits in violation of Section 8(a)(1) and (5). The complaint also alleges numerous independent violations of Section 8(a)(1) and violation of Section 8(a)(1) and (3) arising out of the suspension and discharge of employee Noel Kohler.²

¹ All dates are in 1994 unless otherwise indicated.

² Sec. 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act) state that:

- ...
(a) It shall be an unfair labor practice for an employer—
(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title]
(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization
...

FINDINGS OF FACT

I. JURISDICTION

The Respondents are known collectively as the Shen Automotive Dealership Group. Two dealerships are involved in this case. Shen Chevrolet Geo, Inc., a California corporation, is engaged in retail sale of automobiles as well as parts and automotive services in San Mateo, California. Similarly, Shen Lincoln-Mercury-Mitsubishi, Inc., a Delaware corporation, is engaged in the retail sale of automobiles and parts and automotive services in San Mateo, California. The Respondents admit, and I find, that they are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

The Respondents admit, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Peninsula Bargaining Unit (PBU) is an organization composed of various automotive industry employers. One purpose of this association is to represent its employer-members in negotiating and administering collective-bargaining agreements with various labor organizations, including the Union. The PBU and the Union entered into a collective-bargaining agreement entitled the "PBU Agreement, Automotive Repair Industry of San Mateo County and Northern Santa Clara County." The agreement was effective from July 16, 1989, through July 15, 1993. Respondents' employees at each of the dealerships³ in an appropriate bargaining unit⁴ were covered by separately executed copies of this agreement.

The Respondents timely withdrew from the multiemployer bargaining association and notified the Union that they would be negotiating separately for a successor collective-bargaining agreement. In May and August 1994, having

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [section 159(a) of this title].

Sec. 9(a) provides, in relevant part:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

³ By letter of understanding executed in December 1992, Shen and the Union agreed that effective January 1, 1993, employees at Shen Chevrolet Geo, Inc., who had previously been represented by Local Lodge 1305, would be transferred to the jurisdiction of Local Lodge 1414. Shen also agreed to switch these employees to benefit coverage under the PBU agreement. Further, the parties agreed that "Shen Chevrolet Geo shall be considered a separate bargaining unit, and seniority shall be maintained at the original date of hire."

⁴ The only evidence regarding appropriateness of the bargaining unit on both a multiemployer and single employer basis was the collective-bargaining agreement. This is sufficient to establish the appropriateness of the unit under these circumstances. See, e.g., *Puerto Rico Marine Management*, 242 NLRB 181, 183 (1979).

neared completion of association bargaining, the Union proposed dates for bargaining with Respondents. Before bargaining began, however, the Respondents were presented with petitions from 13 employees in the 20- to 24-person bargaining unit stating that they no longer wished to be represented by the Union. Pursuant to receipt of the petitions, the Respondents withdrew recognition by letter of August 12 and beginning with August discontinued health and welfare, pension, and supplemental disability benefit contributions. Respondents admit that withdrawal of recognition and discontinuance of the benefits occurred without the Union's consent and without bargaining with the Union to a good-faith impasse.

The General Counsel asserts that the withdrawal of recognition and subsequent changes in health and welfare, pension, and supplemental disability benefit contributions are violative of Section 8(a)(1) and (5) because the Respondents were responsible for securing the employee petitions and these petitions were secured in an atmosphere of other unfair labor practices. Respondents admit that, in response to employee questions about how to get rid of the Union, Parts and Service Director Vincent J. LoPresti Jr.,⁵ after consulting a lawyer, informed an employee that the employee could get rid of the Union by providing Respondents with evidence that a majority of employees no longer desired union representation. However, the Respondents assert that they did not taint the withdrawal of recognition and that they did not commit the numerous other alleged prewithdrawal and postwithdrawal independent violations of Section 8(a)(1).

In addition to the allegations surrounding withdrawal of recognition, the General Counsel also alleges that employee Noel Kohler was suspended and discharged in violation of Section 8(a)(1) and (3). The General Counsel argues that Kohler's discharge was motivated by his request on two occasions for a raise which he felt was due and owing under the expired collective-bargaining agreement, by Kohler's contact with the Union on this matter, and by Kohler's wearing of a union hat. The Respondents argue that Kohler was terminated for attempted theft, misappropriation of dealership property, continued falsification of time records, and unacceptably low productivity.

B. Credibility

Weight is given to the administrative law judge's credibility determinations because she "sees the witnesses and hears them testify, while the Board and the reviewing court look only at the cold records." *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). In discussing the deference owed credibility determinations based on demeanor, referred to as testimonial inferences, in *Penasquitos Village v. NLRB*, 565 F.2d 1074, 1078-1079 (9th Cir. 1977), the Ninth Circuit stated:

All aspects of the witness's demeanor—including the expression of his countenance, how he sits or stands,

whether he is inordinately nervous, his coloration during examination, the modulation or pace of his speech and other non-verbal communication—may convince the observing trial judge that the witness is testifying truthfully or falsely.

In addition to these subjective evaluations of witness demeanor, credibility resolutions are also based on the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole. *Panelrama Centers*, 296 NLRB 711 fn. 1 (1989) (where demeanor is not determinative, credibility may also be based on the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole); *Gold Standard Enterprises*, 234 NLRB 618 fn. 4 (1978), enf. denied on other grounds 607 F.2d 1208 (7th Cir. 1979) (failure of administrative law judge to make credibility findings diminishes the importance of the demeanor factor); *V & W Castings*, 231 NLRB 912, 913 (1977), enf. 587 F.2d 1005 (9th Cir. 1978) (where a clear preponderance of all relevant evidence convinces the Board that demeanor credibility resolutions are incorrect, it is impelled to substitute its own judgment). Such credibility findings were referred to in *Penasquitos Village*, supra, as *derivative inferences*. Where required, I have made both demeanor and derivative credibility determinations after carefully weighing all the testimony and the demeanor of the witnesses and bearing in mind the general tendency of witnesses to testify as to their impressions or interpretations of what was said rather than attempting to provide verbatim accounts.

In this instance, the record is replete with testimonial contradiction. I shall not discuss completely all the conflicts in testimony, for to do so would unduly lengthen this decision. On the other hand, I have not ignored all such testimony, nor the arguments of counsel on it. While truth may rest in the testimony of one side in a given respect and on the other side in another, the overall impression of credibility with respect to each witness does not allow for simplistic distinction where virtually every critical element has been placed in issue by contradictory testimony.

C. Prewithdrawal 8(a)(1) Allegations

1. Background

In late July or early August, after working without a successor collective-bargaining agreement for over 1 year, the Respondents' employees, then represented by the Union, met after work with Union Business Representative Don Barbe, and decided that they wanted to conduct a strike vote because there had been no contract negotiations. A secret-ballot vote taken at a later union meeting indicated that the employees present wanted to go on strike.⁶ At this same meeting, journeyman mechanic Gavino Villa was elected shop steward, replacing journeyman mechanic David Wade.

LoPresti received news of the strike vote and afterwards, several employees told him that they were upset about the possibility of going on strike. One of these employees, David

⁵ Vincent J. LoPresti Jr., parts and service director at all relevant times and an admitted supervisor within the meaning of Sec. 2(11) of the Act, was typically referred to as "Vince LoPresti." His brother Phil LoPresti also worked for the Respondents as a service advisor. Throughout this decision, unless otherwise indicated, "LoPresti" will be used to identify Vince LoPresti and when discussing his brother Phil LoPresti, the entire name will be used.

⁶ Various tallies of the secret-ballot vote were: 18 of 21; 15 of 16; or unanimous. In any event, a clear majority voted to authorize a strike.

Wade, told LoPresti he had been talking to other employees in the shop and he wanted to know how they could get out of the Union to avoid the strike vote. LoPresti responded that he would contact Michael Shen, the owner, and find out. The next day, LoPresti spoke to Michael Shen who said he would contact an attorney. An attorney visited the dealership and spoke to LoPresti in Michael Shen's presence in early August. LoPresti testified that he was instructed that he could not say anything about wages, pensions, or vacations, but could only tell employees that "it takes a simple majority vote." LoPresti testified that he thereafter told David Wade that, "It's a simple procedure of taking a majority vote. You need to get over half the guys to vote to decertify. And that was all I was instructed to say." I credit LoPresti's testimony that he spoke to David Wade about the procedures for decertification.

On the contrary, David Wade, the unit employee who obtained the 13 signatures, testified that he became furious after talking with Union Business Representative Don Barbe about the lack of a contract. Barbe told David Wade that the Shen negotiations were being placed on the back burner and that Michael Shen had refused to return phone calls to set up negotiation meetings. David Wade stated, "I started getting a paper ready for the solution of getting the union out of the shop. I just drafted up a couple of papers till it sounded correct. And my wife typed it up, and then we Xeroxed about 20 copies off. And then I took it around to employees that I knew felt the same way, and had them sign it." (Questions on direct omitted.) David Wade testified that he knew what to write in the statement because when he worked at a prior employer another employee had similarly attempted to get rid of the collective-bargaining agent by using signed statements and Wade remembered the language of these statements. Wade testified that he knew that if a majority signed a paper to get rid of the Union the Company could deal directly with employees. David Wade affirmatively stated that he did not discuss the matter with LoPresti or any other management official prior to circulating the papers.⁷ He consistently denied speaking to anyone in management throughout vigorous cross-examination. However, despite his consistency, I do not generally credit David Wade's testimony. Specifically, as to this transaction, LoPresti's version of the facts is more inherently probable. In fact, there would have been no reason for LoPresti to volunteer such information unless it was accurate.

This evidence indicates only that LoPresti responded to David Wade's question about how to get out of the Union to avoid the strike vote by reciting the law. However, an employer may answer specific inquiries regarding the decertification process. See, e.g., *Lee Lumber & Building Material*, 306 NLRB 408, 409 (1992) ("It is clear that, under Section 8(c), an employer may lawfully furnish accurate information,

especially in response to employees' questions, if it does so without making threats or promises of benefits." (Footnote omitted.)) Accordingly, I do not find, nor is it alleged, that LoPresti's comments as set forth above were independently violative of the Act or constituted impermissible solicitation to circulate a petition to decertify the Union.

2. LoPresti's prewithdrawal conduct

The General Counsel contends that prior to withdrawal of recognition LoPresti committed five independent violations of Section 8(a)(1) by threatening to suspend an employee because he contacted the Union, soliciting employees to circulate a petition to decertify the Union, promising employees that the Respondent would pay them \$250 per month more if they decertified the Union, and telling employees they could not remain neutral but had to choose between him and the Union. The threat of suspension for contacting the Union involves employee Noel Kohler, whose suspension and discharge are considered *infra*. The remaining four allegations are discussed below.

a. Solicitation of employee to circulate a petition to decertify the Union; Promise of benefits if employees decertified the Union; and Implied threat that employee had to choose LoPresti or the Union but could not remain neutral

Following his election as shop steward in August, Gavino Villa spoke two or three times with LoPresti about scheduling negotiations. During one of these conversations, LoPresti stated that Owner Michael Shen was upset about receiving a letter from the Union regarding the strike vote. LoPresti told Villa that it seemed like a stupid move, and that a number of the employees, including John and David Wade, had let him know that they were upset with the strike vote and would cross a picket line.

Villa testified that LoPresti told him that "there was talk about possibly eliminating the problem by having the majority sign a little piece of paper that would allow us to hear a proposal from Mr. Shen about a possible contract from him." LoPresti asked Villa to stay "open minded" about the matter. Villa testified that he formed the impression that LoPresti was asking him to circulate a petition: "It felt to me like I was indirectly being possibly asked to carry this piece of paper and sign, even though he—this is just the way I felt." On cross-examination, Villa stated that he asked LoPresti whether LoPresti wanted him to pass around the paper and LoPresti responded only, "It's not going to be me [LoPresti] passing the paper around." Although this testimony was offered to prove that LoPresti solicited employees to circulate a petition to decertify the Union, I do not find that it rises to the level of solicitation. Villa's testimony indicates there was no direct solicitation but merely a subjective feeling on his part.

In a later conversation, LoPresti again requested that Villa keep an open mind about what Shen would offer. LoPresti added that if Villa decided to "go the other way," he could expect as much as a \$300 per month pay increase. In response to Villa's question about such an increase, LoPresti explained that the money that would normally go to union pension could be paid in cash or put into an IRA in addition to the savings in union dues. In a third conversation,

⁷David Wade responded to questions on direct as follows:

Q. Did you discuss this paper with Vince before you put it together?

A. No, I did not.

Q. Had you discussed it with Vince before you gave it to any of the other employees?

A. No, I did not.

Q. Did you tell Vince [LoPresti] that you were going to do it?

A. No, I did not.

LoPresti also stated that Villa should make up his mind because he could not sit on the fence the whole time he was working there.

The credibility of LoPresti and the employee witnesses, including Villa, is the foundational element for the resolution of the alleged 8(a)(1) violations. I do not find LoPresti's testimony credible. LoPresti denied any involvement in obtaining signatures from employees testifying, "I was instructed not to discuss it whatsoever with anybody." Specifically, he denied telling any employee about changes in benefits. In fact, he testified that in response to questions from Villa about benefits, he merely stated he could not discuss such matters.

By contrast, Villa was presented by both the General Counsel and the Respondent on various matters, and I was impressed with his consistent candor in practically all that he had to relate. Villa took great care in providing thoughtful, forthright responses and presented an impressively honest demeanor. Further, several other employees had very similar versions of these one-on-one conversations with LoPresti, despite being sequestered during the hearing. None of these employees' versions of the conversations with LoPresti are identical—they all use their own words and have a ring of probability to them. After full reflection of all the relevant factors, I credit Villa's testimony fully.

Based on Villa's testimony, I find that the Respondent promised that it would pay employees \$300 per month more if they decertified the Union and therefore violated Section 8(a)(1) of the Act. See, e.g., *Highland Yarn Mills*, 313 NLRB 193, 207 (1993) (in soliciting decertification card, statement that union is preventing company from giving a pay raise constitutes an implied promise of benefit); *Pincus Elevator & Electric Co.*, 308 NLRB 684, 692 (1992) (promise or grant of benefits is no less unlawful than threats or disciplinary action if the purpose is to curb union activity).

Additionally, the General Counsel contends that LoPresti's statement that Villa should make up his mind because Villa could not sit on the fence the whole time he was working there constituted a veiled or implied threat in violation of Section 8(a)(1). In determining whether statements constitute an implied threat, the Board, in *TRW, Inc. v. NLRB*, 654 F.2d 307, 313 (5th Cir. 1981), uses a totality of the circumstances approach

. . . in determining whether a statement is an impermissible threat we recognize that language used by the parties involved in a union representational campaign must not be isolated nor analyzed in a vacuum, but must be considered in light of the circumstances existing when such language was spoken.

Kona 60 Minute Photo, 277 NLRB 867 (1985). One factor which has been used by the Board under a totality of the circumstances standard to find an 8(a)(1) violation has been the history of employer hostility towards, or discrimination against, union supporters. *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985); and *3E Co.*, 313 NLRB 12 (1993), *enfd.* 26 F.3d 1 (1st Cir. 1994). The underlying facts, including LoPresti's statement to Villa that a decertification document was being circulated, suggest that Respondent demonstrated union animus and weigh heavily in favor of finding that LoPresti's statement was an implied threat. I find

Villa's testimony that LoPresti stated that Villa should "really try to decide whether he was going to work with him or not," as supportive of this finding of an implied threat in violation of Section 8(a)(1). Based on this totality of circumstances, I find that LoPresti's statement to Villa was an implied threat in violation of the Act. See *Oster Specialty Products*, 315 NLRB 67, 72 (1994) (statement to employee that she needed to make up her mind about voting for the union and that she better get her head on straight was a serious 8(a)(1) violation).

b. Promise of benefits if employees decertified the Union

John Wade, a journeyman auto technician, testified that sometime in August, LoPresti beckoned him to come into his office, asked him to look at a work order, and then stated:

Basically he wanted to talk to me in regards to—he basically told me that what we were doing, or basically the way the shop was going, he needed—Mr. Shen wanted to talk to us. That in order for Mr. Shen to be able to talk to us, we had to sign a paper stating the fact that Mr. Shen would be able to talk to us without representation of the union being present. And to tell us what his idea or actually what his proposal was in order to, you know, for basically what he was willing to give us for wages and benefits . . . [H]e said that basically there would be a letter coming around the shop that he, Vince, could not give to us due to the fact I guess there's a legal technicality with, I guess a legal technicality of some sort in labor. . . . There's a legal technicality that you cannot, him, Mr. LoPresti, hand that piece of paper to us. But Mr. Shen would be able to talk to us if we were able to, or if this paper was signed. [Questions on direct and objection omitted.]

John Wade further testified that LoPresti told him that if Shen employees went nonunion they would save \$57 per month in union dues. John Wade thereafter signed the statement that he no longer desired union representation after receiving it from his brother David Wade. The document stated:

TO: THE MANAGEMENT OF SHEN LINCOLN MERCURY/MISTUBISHI [sic] SHEN CHEVROLET-GEO

I NO LONGER WISH TO BE REPRESENTED BY THE MACHINISTS UNION (INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKS. [sic] AFL-CIO DISTRICT LODGE NO. 190 AND PENINSULA AUTO MECHANICS LOCAL LODGE NO 1414)

John Wade was a probationary employee in August, and as such, he told LoPresti that he would not be able to go on strike. John Wade also stated that LoPresti told him that benefits would be the same or better than under the union contract and there would be a further savings of union dues. I find John Wade's testimony credible. His testimony was hesitant and strained. I find this was due to the pressure of testifying. His demeanor, overall, was consistent with his attempt to relate all events to the best of his ability and I find that LoPresti's statement to him constituted a promise that

the Respondent would grant benefits to employees if they decertified the Union.

c. Interrogation

Albert Castaneda, a journeyman mechanic, signed not only a statement in support of decertification but, in addition, a statement in favor of keeping the Union.⁸ Shortly before the Marriott banquet on about August 19, according to Castaneda, LoPresti asked him to come to his office. LoPresti asked if there was a prounion petition going around and told Castaneda if there was any harassment, to let LoPresti know. On cross-examination, Castaneda testified that he felt pressured into signing the prounion statement by the other employees in the shop. He went to LoPresti and reported this to him. Albert Castaneda was reluctant to testify for the General Counsel and became adverse on direct, testifying that his affidavit, which was read to refresh his recollection, was incorrect because it was taken after he had become intoxicated and did not know what he was saying. Despite his protestations about the circumstances of the taking of his affidavit and his statements that his affidavit did not refresh his recollection, his testimony on direct examination was consistent with his affidavit in that he agreed that LoPresti interrogated him about union activity in the shop. I credit Castaneda's testimony on direct examination over his responses on cross-examination. Castaneda impressed me as a current employee of the Respondent who was afraid he would get into trouble if he testified against the Respondents. His demeanor indicated that he was quite concerned with pleasing the Respondents.

Interrogation is not, by itself, a per se violation of Section 8(a)(1). In determining whether a violation has occurred the Board looks to further factors to determine whether, under all the circumstances, the interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Emery Worldwide*, 309 NLRB 185, 187 (1993). Some of the factors used by the Board under its totality of circumstances approach have been: whether the interrogated employee is an open or active union supporter, the background of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of the interrogation. *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). Given the facts of this case, it appears clear that LoPresti's interrogation of Albert Castaneda interfered with Castaneda's Section 7 rights. In particular, the fact that the meeting occurred in LoPresti's office, and that the interrogation occurred within the midst of numerous other unfair labor practices suggests a coercive character to this interrogation. Therefore, I find that there is ample evidence to suggest that this interrogation represents a violation of Section 8(a)(1) of the Act.

3. David Wade's prewithdrawal conduct

The General Counsel alleges that David Wade, acting as an agent of the Respondent, committed five independent violations of Section 8(a)(1) as follows: solicited an employee to sign an antiunion statement; threatened employees that they could lose their job if they did not sign a petition to decertify the Union; interrogated an employee about his

union sympathies; solicited employees to sign a petition to decertify the Union; and promised employees that they would receive raises if they decertified the Union.⁹

Employee Kenneth Kramer, a highly reliable witness,¹⁰ testified that he noticed during late August and early September that David Wade was absent from his position in the garage for unusually long test drives—as long as 1 to 2 hours. On these occasions, David Wade took other employees along with him. For instance, Albert Castaneda testified that he went on a test drive with David Wade in August. Although the automobile had a belt noise which the two discussed briefly, the bulk of their conversation concerned decertification of the Union. During the course of this conversation, David Wade asked Albert Castaneda to sign a statement declaring that he no longer wished to be represented by the Union. Albert Castaneda complied with this request and signed the statement dating it August 10, 1994. After Castaneda signed the document, David Wade asked him not to tell anyone that they had discussed the Union during the test drive.

On returning from a 1-week suspension on August 7 or 8, Noel Kohler, utility mechanic, was asked by David Wade to go for a test drive. As they were leaving the shop area David Wade spoke to LoPresti stating that the "other deal or other arrangement had been taken care of." Kohler looked at David Wade with a puzzled expression and David Wade said, "[D]on't worry, it's just a code between Vince [LoPresti] and I." During the test drive, David Wade asked Kohler to sign a statement that he longer desired the Union to represent the employees. Kohler signed the statement although he initially expressed a concern that getting rid of the Union was a rather drastic step. David Wade told Kohler that practically everyone else had already signed. David Wade also admonished Kohler that both he and LoPresti would deny what had occurred. Several days later Kohler signed a petition to keep the Union at Shen.

Former employee Gary Christensen, a mechanic, credibly testified that in early August he was told by Michael Salvi, service dispatcher, to report to LoPresti's office. On reporting, LoPresti told Christensen that, "a piece of paper regarding the union, nonunion thing," would be sent around the shop and, "all we had to do was sign it and then we can listen to both sides, the union side or the nonunion side." About a week later, on August 10, David Wade brought a piece of paper for Christensen to sign. Christensen signed the document which was identical to those signed by other employees.

Sometime after signing this, Christensen apparently changed his mind and signed employee Donald Podesta's paper, "to get the union back in." Respondents argue that Christensen's testimony should be discredited because he harbored substantial animosity toward LoPresti due to his subsequent discharge by LoPresti. In addition, Respondents note that Christensen's affidavit to the NLRB differed from

⁹The complaint alleges both soliciting employees to sign an antiunion statement as well as soliciting employees to sign a petition to decertify the Union with regard to David Wade. No separate evidence was presented which would delineate separate violations. Accordingly, these allegations are treated as one.

¹⁰Kramer provided clear, concise answers to all questions. He was not argumentative but retained his composure and consistency on vigorous cross-examination.

⁸It is unclear whether Villa or Podesta, one of the mechanics, asked him to sign this form.

his testimony. While, I find that Christensen did indeed harbor animosity toward LoPresti, I do not find that this animosity colored his recollection of the conversation with LoPresti. Moreover, I note that Christensen's testimony was consistent with the testimony of other employee witnesses who continued to be employed by Shen and who described similar conversations with LoPresti, despite the fact that all of these witnesses were sequestered during the hearing. Further, although Christensen admitted that a particular phrase from his direct testimony was "probably not" in his affidavit, this admission is with regard to a subject matter in which a divergence is not significant to an evaluation of credibility.¹¹ Finally, Respondents note that Christensen's affidavit was admittedly taken late in the evening after he had drunk four beers. Because the divergence between Christensen's testimony and his affidavit is slight, I find that the fact that he had drunk four beers over a 5-hour period at the time he gave his affidavit does not reflect on Christensen's credibility. On the contrary, his reluctant admission about consuming alcohol indicated, if anything, that he was grudgingly truthful.¹² I find that by alerting Christensen to the imminent circulation of the decertification petition and requesting that Christensen sign it, LoPresti impermissibly sponsored the petition and solicited employee support for the decertification. By his same conduct with regard to Villa and John Wade, LoPresti also impermissibly sponsored the petition and tainted the withdrawal of recognition.

The above testimony was not contradicted by David Wade and supports a finding that David Wade solicited employees to sign statements that they no longer desired to be represented by the Union. However, there is no testimony to support the allegations that he threatened employees that they could lose their jobs if they did not sign these statements,

¹¹ Christensen was asked on cross-examination, "Now, this phrase that you used, you can pick the best side, union or nonunion. That's not in your affidavit, is it?" He responded, "Probably not." Actually, the question did not quote word for word Christensen's actual testimony which, as set forth above, was, "all we had to do was sign it and then we can listen to both sides, the union side or the nonunion side."

¹² At least three witnesses, Christensen, Albert Castaneda, and John Wade, gave affidavits one evening at Christensen's garage. All of these witnesses admitted they drank beer while waiting to give their affidavits. John Wade, who gave his affidavit first, stated he had one beer; Christensen, four; and Alfred Castaneda, five. John Wade and Christensen testified that their statements were taken separately and no witness was present during another's affidavit. The Board agent was not present where beer was being consumed and there is no evidence that he consumed any beer himself. These witnesses were again sequestered at trial. Their testimony related individual conversations with LoPresti. Under these circumstances, while certainly not condoning drinking beer before giving a sworn affidavit, I nevertheless do not accept the Respondent's argument that these witnesses should be discredited at trial because they drank beer when they gave their affidavits. Albert Castaneda testified that he was too drunk to tell the truth when he gave his affidavit. In a statement provided to the Respondent and admitted without objection, Albert Castaneda stated that other witnesses supplied answers for him. His testimony on direct examination, however, indicated that LoPresti interrogated him and that David Wade solicited a decertification statement from him while on a test drive. Accordingly, it was unnecessary to rely on his affidavit which was offered at the conclusion of the hearing and rejected due to the lateness of its proffer and the absence of Albert Castaneda.

promised employees that they would receive raises if they decertified the Union, or interrogated employees about their union sympathies. In order to determine whether the solicitation of signatures to withdraw support from the Union violated the Act, David Wade's agency status must be determined.

4. David Wade's agency status

The only basis on which to find David Wade's statements attributable to the Respondents is employment of the agency doctrine of apparent authority. Section 2(13) of the Act provides that:

In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Whether someone acts as an agent under the NLRA must be determined by common law principles of agency. *Longshoremen ILA (Coastal Stevedoring Co.)*, 313 NLRB 412, 415 (1993), remanded 56 F.3d 205 (D.C. Cir 1995) (citing 93 Cong.Rec. 6858-59—remarks of Senator Taft). These common law principles of agency incorporate principles of implied and apparent authority, see *Dentech Corp.*, 294 NLRB 924, 925 (1989), quoting from *Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82 (1988):

Apparent authority is created through a manifestation by the principal to a third party that supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the act in question. *NLRB v. Donkin's Inn*, 532 F.2d 138, 141 (9th Cir. 1976); *Alliance Rubber Co.*, 286 NLRB 645, 646 fn. 4 (1987). Thus, either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or the principal should realize that this conduct is likely to create such belief. Restatement 2d, Agency § 27 (1958, Comment). Two conditions, therefore, must be satisfied before apparent authority is deemed created: (1) there must be some manifestation by the principal to a third party, and (2) the third party must believe that the extent of the authority granted to the agent encompasses the contemplated activity. *Id.* at § 8.

See also *Great American Products*, 312 NLRB 962, 963 (1992). Stated in a more subjective manner, "an employer can be responsible for the conduct of an employee, as an agent, where under all the circumstances the employees would reasonably believe that the individual was reflecting company policy and acting on behalf of management." *Kosher Plaza Supermarket*, 313 NLRB 74, 85 (1993). In these cases, the burden of proof is placed on the party asserting the agency relationship, in this case the General Counsel.

LoPresti told employees that a piece of paper would be circulated but he could not personally circulate the paper. He encouraged employees to sign the paper and promised that benefits would be better if the Union were decertified. Based on these manifestations, an employee who was approached by David Wade to sign a piece of paper to decertify the Union would have a reasonable basis to believe that David

Wade was acting in accordance with LoPresti's statements and with apparent authority to solicit the signatures. The General Counsel has satisfied its burden of showing David Wade's apparent authority. Accordingly, I find David Wade's statements attributable to the Respondents, and hence, I find that the Respondents violated Section 8(a)(1) in soliciting employees to sign petitions to decertify the Union.

5. Charley Shen's prewithdrawal conduct

Charley Shen is the brother of Owner Mike Shen. Charley Shen testified that he works for Shen Mitsubishi as the service adviser and repair shop dispatcher. According to the collective-bargaining agreement, this position is included in the bargaining unit. Charley Shen's status as a supervisor and agent of the Respondent was denied. The General Counsel contends that Charley Shen committed five independent prewithdrawal violations of Section 8(a)(1) as follows: solicitation of employees to sign a petition to decertify the Union; telling employees that Mike Shen did not want to deal with the Union or have the Union making decisions for him; soliciting antiunion statements; coercing employees to sign antiunion statements; and telling employees that Mike Shen was displeased because he could not get rid of unqualified employees while the Union continued to represent employees.

The General Counsel alleges that Charley Shen's statements must be attributed to the Respondents because Charley Shen is a supervisor and/or agent within the meaning of Section 2(11) and (13). The General Counsel argues that Charley Shen's supervisory status is shown because he directs work, makes and modifies work assignments, and grants time off. The Respondents argue that Charley Shen does not have the authority to hire, fire, discipline, or discharge employees nor can he assign overtime and therefore is neither supervisor nor agent under the Act. Moreover, his position, service adviser, is included in the collective-bargaining unit. The burden of proving supervisory status is on the party asserting that such status exists. *St. Alphonsus Hospital*, 261 NLRB 620, 624 (1982), enf. 703 F.2d 577 (9th Cir. 1983); *Bakers of Paris*, 288 NLRB 991 (1988), enf. 929 F.2d 1427, 1445 (9th Cir. 1991).

Section 2(11) of the Act provides that:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Douglas Isonio, a mechanic with the Mitsubishi Division, testified that Charley Shen assigns work to him and that he requests time off from Charley Shen. If he is going to be late, he calls Charley Shen. Charley Shen testified that he has been a service adviser and repair shop dispatcher for Shen Mitsubishi since January 1993. Before that he was service advisor at Shen Lincoln/Mercury. He is paid a salary as are all service advisers. He does not attend manager meetings. He has never hired or fired an employee and has no authority

to do such. He has never disciplined an employee but doesn't know of anyone who was disciplined except Isonio about 2 weeks before the hearing (late February 1995) and that was done by Walter Preusse, parts and service director. Charley Shen is not consulted for raises. He has not seen a profit-and-loss statement and has no ownership interest in any of the dealerships. He does not take care of paycheck problems, benefits, or insurance. Employees call him when they are sick. He cannot force an employee to work overtime. He assigns work to employees. Don Barbe testified that Charley Shen had once given him a business card which identified him as a "service manager." Although Charley Shen denied this, even if it were true, that title in and of itself is insufficient to confer supervisory status. *Davis Supermarkets*, 306 NLRB 426, 458 (1992), enf. 2 F.3d 1162 (D.C. Cir. 1993). The facts are indicative of nothing more than routine assignments which do not require the exercise of independent judgment. Accordingly, I find that Charley Shen occupied the position of service adviser and was a member of the bargaining unit. Isonio's testimony is consistent with this finding.

It has not been shown that Charley Shen responsibly directs employees or independently authorizes time off. Moreover, no evidence indicates that he utilizes independent judgment in assignment of work. Accordingly, I find that he is not a supervisor within the meaning of Section 2(11) of the Act. See, e.g., *Clark Machine Corp.*, 308 NLRB 555, 556 (1992) (despite fact that employees considered Woolfrey to be supervisor, fact that he assigned work, transferred employees, and instructed employees to correct mistakes, Woolfrey was employee because his assignments did not involve independent judgment and he merely pointed out obvious flaws in work); *Quadrex Environmental Co.*, 308 NLRB 101 (1992) (communication of routine instructions and assignment of tasks predetermined by management indicative of lack of sufficient discretion to be statutory supervisors). Secondary, nonstatutory indicia of supervisory status such as salaried compensation or lack of supervision if this employee is not a supervisor, are insufficient alone to confer statutory supervisory status. *Billows Electric Supply*, 311 NLRB 878 (1993).

However, even absent a finding that Charlie Shen is a supervisor under the Act, it must be determined whether he was an agent. I find that this record does not demonstrate that Charlie Shen was an agent for Respondents and acting on behalf of management for purposes of soliciting the decertification signature of Isonio or making statements on behalf of management about the Union.

In the context of employees with a close familial relationship to business owners, this, "familial relationship is one of the facts to be considered in determining apparent authority and, when viewed in the context of other factors, may be sufficient for a finding of agency based on apparent authority." *Laborers Local 270 (OPEIU)*, 285 NLRB 1026, 1028 (1987). The Board has not found that close familial relationship creates apparent authority in cases where the employee is clearly temporary and is performing menial tasks. See, e.g., *Churchill's Restaurant*, 276 NLRB 775 (1985) (daughter of owner of restaurant who was an office clerk and occasional hostess-cashier and had no authority explicit or implicit to assign work or to control work schedules was not deemed a supervisor); *Sonicraft, Inc.*, 295 NLRB 766, 774-775 (1989), enf. 905 F.2d 146 (7th Cir. 1990), cert. denied 112 L.Ed.2d

664 (1991) (simple father-son relationship without more insufficient where son held clerical position).

However, in other circumstances, the Board has found that a family member's actions were attributable to the owner. In *Guille Steel Products Co.*, 303 NLRB 537 (1991), foreman Jackson Timms, the son of one of the owners, was perceived by employees as a supervisor. On occasions when the union attempted to solicit employees to sign union authorization cards, plant manager Ellis appeared with other unidentified men wearing hard hats, carrying walkie-talkies, and writing on clipboards. These men and Ellis told employees not to talk to the union representatives. Later, at a store near the employer's premises where employees met with union organizers, Timms stood in front of the store. When the union thereafter attempted to solicit at the front and rear entrances of the plant, Timms and others perceived by employees to be supervisors, joined the activities, using walkie-talkies, writing on clipboards, and telling employees not to talk to the union representatives. Although Timms' supervisory status was not at issue, the Board adopted the administrative law judge's conclusion that Timms was an agent of the employer for purposes of the alleged surveillance.

Charley Shen's situation lies somewhere between these two scenarios. He occupies a leadman-type position and is the brother of the owner. On the other hand, the record does not reflect any special privileges or status evolving from the familial relationship. There is no evidence in the record upon which to find that Isonio would reasonably have believed that Charlie Shen was acting for the Respondents. The record is devoid of any manifestations of Mike Shen or Phil LoPresti which would supply any basis for Isonio to believe that they authorized Charley Shen to perform the acts in question. Isonio was isolated from the other employees and was not told by LoPresti that someone would be bringing around a paper to decertify the Union. Moreover, as a unit employee, Charley Shen had every right to attempt to solicit support for the decertification effort. This would be true even if he were a statutory supervisor. See *A.T. & K. Enterprises*, 264 NLRB 1278, 1283 (1982), quoting *Montgomery Ward & Co.*, 115 NLRB 645, 647 (1956), *enfd.* 242 F.2d 497 (2d Cir. 1957), *cert. denied* 355 U.S. 829 (1957):

Responsibility of conduct of statutory supervisors who are also bargaining unit members will not be imputed to the employer in the absence of evidence that the employer "encouraged, authorized or ratified" such conduct or that the employer "acted in such a manner as to lead employees reasonably to believe that the supervisor was acting for and on behalf of management."

Accordingly, under all the circumstances, I find that Charley Shen did not possess apparent authority.¹³

¹³ Were Charley Shen an agent, the evidence from Isonio, whom I credit over Charley Shen, indicated that Charley Shen solicited a decertification document from Isonio. Later, Isonio requested that Charley Shen return the document. The document was returned and was not relied on by the Respondent in its withdrawal of recognition. In addition, I credit Isonio that Charley Shen told him that his brother Michael Shen would like to get rid of the Union because it would give him more flexibility in getting rid of borderline employees. These statements, however, cannot form the basis for finding agency authority because these statements were made by the alleged

D. Withdrawal of Recognition

On August 12, David Wade gave LoPresti 12 signed statements. John Wade added his statement at a later time. LoPresti examined the 13 statements and recognized the signatures. He gave the statements to Owner Michael Shen who authored a letter to the Union that same day withdrawing recognition.¹⁴ I find that the withdrawal of recognition was unlawful because the statements were tainted.

In order to lawfully withdraw recognition from an incumbent union, an employer must have actual proof of lack of majority support or a good-faith doubt regarding the union's continued majority status, based on sufficient objective considerations. *Tyson's Foods*, 311 NLRB 552, 555-556 (1993), and cases cited there. In *Process Supply*, 300 NLRB 756, 758 (1990), however, these objective considerations may not be the result of the employer's efforts:

The law is clear that an employer must stay out of any effort to decertify an incumbent union. After all, the employer is duty bound to bargain in good faith with that union. Although an employer may answer specific inquiries regarding decertification, the Board has found unlawful an employer's assistance in the circulation of such a petition were the employees would reasonably believe that it is sponsoring or instigating the petition. Such unlawful assistance includes planting the seed for the circulation and filing of a petition, providing assistance in its wording, typing, or filing with the Board, and knowingly permitting its circulation on worktime. See *Marriott In Flite Services*, 258 NLRB 744, 768-769 (1981); *Silver Spur Casino*, 270 NLRB 1067, 1071 (1984); *Weiser Optical Co.*, 274 NLRB 961 (1984); *Central Washington Hospital*, 279 NLRB 60, 64 (1986).

By alerting employees to the eminent circulation of the petition, promising a pay increase (or at least an alteration in availability of pension funds and union dues) if the Union were decertified, and impliedly threatening an employee to make up his mind, through LoPresti, and by clothing David Wade with apparent authority and through him soliciting employees to decertify the Union, the Respondent impermissibly interfered with employee free choice. *Caterair International*, 309 NLRB 869 (1992), *enfd.* in relevant part and remanded in part 22 F.3d 1114 (D.C. Cir. 1994). Accordingly, the evidence of disaffection with the Union on which the Respond-

agent, not by the principal. As to other violations of Sec. 8(a)(1) alleged to have been committed by Charley Shen, no evidence was presented. The solicitation violation is cumulative of other violations already found. Moreover, because Isonio's statement was returned to him, if was not one of the 13 statements utilized in withdrawing recognition. The statement that the owner would like to get rid of the Union and would have more flexibility in discharging borderline employees if the Union were not present, if attributable to the Respondents, would be violative based on all the surrounding circumstances. See *Caterair International*, 309 NLRB 869, 879 (1992) (labor relations director's statement that the company did not want the union and would use any means to get the union out held violative in context of company's circulation of decertification petition).

¹⁴ At this time, there were about 20 to 24 employees in the bargaining unit. The exact number of employees in the unit is not relevant in view of my other findings.

ent relied was unlawfully procured and any evidence so procured is tainted. *Tyson Foods*, supra, 569.

Nevertheless, in late August, the Respondent gathered bargaining unit employees at a Marriott for an evening dinner. Owner Mike Shen spoke to the employees telling them that, "we were as of now a nonunion shop." He continued that all benefits would be the same and that if employees did not like this arrangement, they were welcome to leave. On the day following this dinner, some of the employees suggested that a vote be taken to determine whether employees wanted the Union. However, the Respondent did not rely on this vote in withdrawing recognition and it does not appear that all employees took part in the vote. Thus, Mike Shen's statement at the banquet, while not alleged as a violation of the Act, is evidence that Respondent relied on the decertification statements solicited by Wade as the basis for withdrawal of recognition.

E. Postwithdrawal 8(a)(1) Allegations

1. Unlawful assistance in withdrawal of membership in the Union

The General Counsel alleges that LoPresti violated the Act after withdrawal of recognition by unlawfully assisting employees in their withdrawal of membership from the Union on an unknown date in late November or early December.

Sometime in late November when union leafletters were at the facilities, journeyman mechanic Charles David Morgan approached the dispatch window to obtain another job. John and David Wade, Albert and Alfred Castaneda, and Vince LoPresti and Mike Salvi were engaged in conversation in that area. Morgan credibly testified that he overheard the following:

They were talking about going down to the union to get a withdrawal, and everybody says, yeah, well, I'm going to go, and yeah, they can't keep my money, they can't make me pay anything. And they were talking about at that time even if we do have to pay the reinstatement fees back, it'll be less than the amount of dues that we'd have to pay in the whole long period of time.

And somebody mentioned, and I don't know who it was, that yeah, you ought to give us the shop van to go down there. And Mr. Vince LoPresti then said, yeah, sure, okay.

Morgan recalled specifically that Vince LoPresti said, "[Y]eah, they wouldn't hold my money." Following this conversation, David Wade asked employees who were working in the shop if they wanted to go in the van. Morgan declined the invitation because, as he explained, he had a grievance pending with the Union regarding his last employer and he was going to keep paying dues.¹⁵

¹⁵ A great deal of testimony was developed regarding in what manner Preusse became aware of the fact that Morgan had a grievance pending at Golden Cadillac. According to Preusse, he learned of this during a conversation with employee John Castorina and David Morgan in which Morgan stated that he had a "case" with Golden Gate Cadillac. Castorina corroborated Preusse's version of this conversation. Preusse denied that he had ever asked Morgan in

As he returned at 12:30 p.m. from his lunch, Shop Steward Villa also saw the van load up with employees Albert and Alfred Castaneda, David and John Wade, Doc Yee, Walter Torres, John Castorina, Gene Rairez, and Phil LoPresti. Villa approached the van and asked where the employees were going. Someone, probably one of the Castaneda brothers, told him that they were going to the union hall to complain about the pickets and to withdraw from the Union.

Barbe spoke with the employees who came by van to the union hall. He explained the withdrawal process to them and gave some of them withdrawal cards. The employees told Barbe that LoPresti gave them the company van to come to the union hall.

Meanwhile, Villa was upset that so many employees had left. He had to work on a Chevrolet that was promised to be completed and was pulled from his other repair work. He saw the employees return at 2:30 p.m. When the employees returned, they punched the timeclock and then, beginning with David Wade, each employee took his timecard into LoPresti's office.

LoPresti testified that anyone was free to use the van, that these particular employees left at noon and were free to use their lunchtime as they desired. He testified that he did not know if employees were paid when they went to the union hall. However, testimony from several employees contradicted LoPresti's testimony. Gavino Villa testified that the employees left just after 12:30 p.m. and did not come back until 2:30 p.m., and that lunch ran from 12 to 12:30 p.m. for mechanics. Villa further testified that the van was never used by mechanics to get lunch, and was only driven by two nonunit employees for work related errands. Charles Morgan on cross-examination stated that only on one occasion had employees used the van for lunch and that was for a special Christmas lunch given by one of the companies servicing the dealership. I find Morgan's and Villa's testimony contain an air of truth, plausibility, and simple sincerity. Both of these witnesses's demeanors suggested earnest and thoughtful responses to the questions that were asked and noted limitations of knowledge when appropriate. I therefore credit these witnesses. LoPresti, by contrast, seemed unwilling to respond to questions in a helpful way, and was generally unconvincing. Therefore, I do not credit LoPresti's account. Hence, I find that Respondent violated Section 8(a)(1) by unlawfully assisting employees in their withdrawal of membership from the Union. *NLRB v. American Linen Supply Co.*, 945 F.2d 1428, 1433 (8th Cir. 1991) (holding that an employer violated Sec. 8(a)(1) and (5) by soliciting one employee to withdraw from the Union, provided worktime to complete the statements, a notary public and copy machines); *Manhattan Eye, Ear & Throat Hospital*, 280 NLRB 113 (1985), enf'd, 814 F.2d 653 (2d Cir. 1987), cert. denied 483 U.S. 1021 (1987) (holding that employer violated Sec. 8(a)(1) by soliciting employees to withdraw from Union and offering to help compose letters for employees in their efforts to withdraw from union).

2. Interrogation

The General Counsel also alleges that Walter Preusse violated Section 8(a)(1) by interrogating employees about their

any conversation about a "grievance" that Morgan was pursuing at Golden Gate Cadillac.

filing grievances against former employers. Later on the same day that employees went to the union hall to withdraw their membership, according to Morgan, Walter Preusse, parts manager, asked Morgan if he had a grievance pending at his last employer's and Morgan responded that he did. I find Preusse's account that he heard about the grievance by chance unlikely given Morgan's understandable fears of making his union involvement readily known to Preusse and given what the record demonstrates was a deliberate attempt by Respondents in the preceding few months to rid their business of the Union.¹⁶ I find Preusse's denial that he ever spoke to Morgan about the grievance similarly lacking in credibility.

Were the facts of Preusse's interrogation of Morgan isolated from the surrounding background and not in the context of this case I would not find a violation. However, in the context of the employer's involvement in employee's withdrawal from the Union on the same day, this interrogation becomes suspect. I find that the purpose and effect of this interrogation was to convey to Morgan and other employees that the employer did not approve of Morgan's failure to join other employees in withdrawing from the Union. Preusse is not specifically alleged to be a supervisor or agent of the Respondent. In fact, this allegation of interrogation was originally listed as a statement attributable to LoPresti. Only after Morgan's testimony was the allegation corrected to Preusse. Although, I note that another finding of interrogation would be cumulative in any event, I nevertheless find that Preusse's questioning was attributable to the Respondent.¹⁷

3. Threat of loss of jobs by voting to picket and impression of surveillance

The General Counsel alleges that David Wade violated Section 8(a)(1) by threatening employees who had voted to picket Respondent that they would not be working much longer for Respondent and creating the impression that Respondent had surveilled employees who attended the union meeting when employees voted to picket.

On the day following Morgan's conversation with Preusse, Morgan asked David Wade if he had repeated to Preusse the information regarding Morgan's grievance, explaining that he wanted this matter kept private. David Wade responded that he did not repeat that information to Preusse but, in any event, Morgan need not worry because, "he [David Wade] had been talking with Mr. Shen and that he knows who is and who is not secure in their job around there." According

to Morgan, David Wade also added that he knew who had gone to the strike vote meeting and "they were short-lived around there. And I didn't have anything to worry about, my job." I find Morgan's testimony convincing. The short gap in time between Morgan's discussion with Wade and Preusse's discussion with Morgan, combined with Morgan's credible testimony, and the 8(a)(1) violations of that same day, lead me to accept Morgan's version of the events.

David Wade's agency authority for purposes of soliciting statements from employees stating they no longer desired union representation logically extends to statements in November regarding Owner Mike Shen's knowledge of union meetings. I find that David Wade's statements to Morgan violate Section 8(a)(1) by threatening retaliation for union activity and giving the impression that union meetings were surveilled. I note that David Wade, a rank-and-file employee and former union member, did not attend this meeting.

F. The Suspension and Discharge of Noel Kohler

1. Facts

Kohler was a utility mechanic¹⁸ at Shen Lincoln Mercury from January 10 to November 11. He had been a member of the Union at his previous job and continued his membership while employed at Shen. His duties included performance of predelivery inspections of new cars and lubrication, oil, and filter changes.

On July 14, Kohler received a written warning on an employee disciplinary report form for causing \$276.47 damage to a customer's car, for low efficiency ratings, and for leaving the job without permission. This warning was labeled as offense number 1. Sometime after July 21, LoPresti spoke to Kohler about altering timecard entries on timecards dated from July 1–21 and told him not to make such alterations without approval from management. In fact, LoPresti recalled admonishing Kohler on this occasion, showing him about three altered timecards. According to LoPresti, on that occasion Kohler stated that he would not alter the timecards again. Service advisers utilize the time entries on timecards to input information into the computer. From this data, the computer generates efficiency ratings and calculates any employee bonus due. If a handwritten entry is made, the service adviser enters the handwritten entry rather than the original timeclock entry.

Kohler believed that he was entitled to a wage increase after working for 6 months at Shen. He thought this was set out in the collective-bargaining agreement. On July 18, Kohler spoke to LoPresti about the raise. LoPresti responded that there was no contract and he did not have the resources to give Kohler a raise. Kohler sought out David Wade, the shop steward at that time. He asked David Wade about LoPresti's response and David Wade said that LoPresti was wrong, the old collective-bargaining agreement was still in effect according to Don Barbe, business representative of the Union.

A few days later, David Wade and Kohler met with LoPresti. Kohler told LoPresti that the contract was still in

¹⁶ LoPresti testified that he knew of Morgan's grievance regarding his discharge at Golden Gate Cadillac because Morgan told him about it at the time of his interview. This was contradicted by Preusse who was also present at the interview.

¹⁷ Preusse testified that he was the parts director at the time of this interrogation. In February 1995, he became parts and service director when LoPresti left the dealership. He testified that all parts department employees, service advisers, mechanics, lot attendants, lube men, car washers and detailers "report" to him in his capacity as parts and service director. Reading between the lines, it is possible to infer that as parts director, the parts department employees "reported" to Preusse. In addition, at LoPresti's request, Preusse was present on behalf of management during a disciplinary interview of Kohler. He was also present during Kramer's job interview. Based on these facts, I find that Preusse acted at least as an agent of the Respondent in questioning Morgan about the grievance.

¹⁸ The PBU agreement provides, "The Utility Mechanic may perform light mechanical repair work; consisting of brake adjustments, brake sanding, polishing or installing decals. He cannot align, straighten, replace or repair sheetmetal."

effect and entitled Kohler to the increase. LoPresti asked David Wade if it was true that the contract was still in effect, David Wade responded "yes," and LoPresti said he would talk to the accountant and take care of the matter. Kohler never received the wage increase. Neither LoPresti nor David Wade denied any of the conversations with Kohler regarding a pay increase.

On July 19, Kohler was assigned work on a loaner car. On inspecting the brakes, he testified that only 10 percent of the frictional material on the front pads was present.¹⁹ He testified he marked this fact on his work order, and informed service adviser Phil LoPresti that the brakes needed attention. According to Kohler, Phil LoPresti told Kohler to get the tires back on the car and get the car to the customer. Kohler stated at trial that he did not believe that he had the authority to keep a car in the garage if he discovered a serious problem, like a brake problem. He had the "impression" that service advisers had this authority. Phil LoPresti denied that Kohler called the brakes to his attention. The car was returned the following day by the customer due to a grinding sound when the brakes were applied. According to LoPresti, the customer had driven the car only about 10 to 15 miles.²⁰ Mechanic Walter Torres worked on the car when it was returned and asked Kohler to come over and look at the car. Thereafter, Vince LoPresti told Kohler that the brakes were metal to metal. Kohler told LoPresti that he understood the seriousness. Kohler did not testify that he told Vince LoPresti that he had informed Phil LoPresti of the condition of the brakes before the car was sent out.

On July 28, Kohler called the Union but failed to reach Barbe. Barbe returned Kohler's call the following day, July 29, at work. Kohler was paged on the intercom to report to service dispatcher Mike Salvi²¹ to get a telephone message. The message was from Barbe. Kohler returned Barbe's call from a telephone in the driveway and arranged that Barbe would meet employees after work that day. Kohler told employees to stay after work to meet with Barbe at 4:30 p.m. On the same day, David Wade told employee Kenneth Kramer that LoPresti had found out that Kohler had called the Union and spoke to Don Barbe. Wade said LoPresti was going to suspend Kohler for a week. This conversation occurred about noontime while Wade and Kramer were washing up for lunch.²²

About one-half hour before quitting time on July 29, David Wade approached Kohler and told him to come to

LoPresti's office with him. LoPresti told Kohler that he was very upset about the loaner car going out to a customer when the brakes had only 10 percent on them. LoPresti said the company could have been sued. According to Kohler, LoPresti added that he knew Kohler had called the Union. LoPresti denied that the subject of the Union was discussed during the conversation. LoPresti disciplined Kohler with a warning and a 1-week suspension. This was the third time Kohler was disciplined. David Wade and Walter Preusse, parts manager, were both present during this conversation. Preusse recalled that Kohler stated that he thought the brakes were in better shape than metal to metal and said, "I guess I screwed up, I can't tell what the brakes are; he says, I'm not quite sure. I looked at it, I thought it had more brakes than it did." Preusse testified that the subject of the Union was never mentioned during this meeting. Preusse thought that timecard entry alteration was also discussed at this meeting and that Kohler stated that he would try not to make any further alterations. David Wade corroborated Preusse's testimony fully and added that LoPresti also told Kohler he could have been discharged for this conduct but because LoPresti liked Kohler and thought he was a good, hard worker, he would only be suspended.

Barbe met with employees at the shop shortly thereafter. Some of the employees were interested in taking a strike vote. Kohler showed Barbe his disciplinary documents and told him that he thought he had been suspended because LoPresti had found out he called the Union. According to Barbe, David Wade also told Barbe that LoPresti knew that Kohler had called the Union. As the meeting was breaking up, LoPresti approached the group and was present when a parts department employee asked, "[W]hat it would take for the parts people to join the union." The employees agreed to have a formal meeting at the union hall the following Tuesday.

At the union meeting, the strike vote was indeed taken. In addition, Villa was elected to replace David Wade as shop steward. Kohler and Barbe met during the next week. After Barbe explained various options to Kohler regarding his suspension, Kohler decided not to file a grievance but to write a letter to LoPresti. He returned to work on August 7 or 8. Barbe amended the underlying unfair labor practice charge herein on September 19 to alleged that Kohler's suspension was due to his union activity.

In late September, LoPresti and Walter Preusse issued a more serious warning to Kohler for continuing to alter timestamps on his timecard without the signature of dispatcher Mike Salvi, or of Preusse or LoPresti.²³ Kohler admitted, "basically that I had been darkening in some of the

¹⁹ According to Kohler, brakes at 10 percent are not the same thing as "metal to metal" but are extremely low—100 percent being a new brake pad. The inspection report reflects, "10%" marked for the front brakes. The technician's initials are "NEK."

²⁰ David Wade's testimony that the car was returned within 5 minutes is discredited. LoPresti testified that he had been working with this particular customer extensively. LoPresti recalled the exact locations to which the car had been driven and remembered that it was returned the day after it was loaned out. However, Kohler thought the car was returned 6 days after it was sent out.

²¹ The parties stipulated that Salvi was a member of the bargaining unit.

²² This statement was made at a time when David Wade was union steward and predates that period of time when David Wade began circulating decertification documents on behalf of the Respondent. Accordingly, I find that the statement constitutes hearsay. I do not find a separate violation of Sec. 8(a)(1) because I do not attribute the statement to management.

²³ The timecard system utilized a separate timecard in triplicate for each day. The bottom copy was heavier paperboard and was used for timekeeping purposes. The middle, pink copy was given to the employee for his records. The top copy was perforated with "in" and "out" designations. Each job was time-stamped in and out and then torn off and attached to the back of the work order. These perforated portions of the timecard were referred to as flags. Time was measured in tenths of an hour. Each tenth of an hour, accordingly, indicated a 6-minute lapse of time. For instance, 9.4 on the time-clock, signified 9:24 on an ordinary clock; 9.5 signified 9:30, and so on. Alteration of timecards could affect the amount of an employee's bonus, the amount of an employee's base pay, and could cause problems if the company was audited by the factory.

stamps on the time card so there was more clearance to what the time was that was punched on the time card.” Timecards discussed during the late September meeting included a timecard for August 31, September 12, and September 29. There is no dispute that alteration of time stamps without permission was against company policy and there is no dispute that Kohler knew of this policy.²⁴

Kohler was absent from work in early October due to an injury and returned to his job on October 17. During Kohler’s absence, technician Donald Podesta, in need of a license plate frame and knowing that Kohler ordinarily installed license plates, searched Kohler’s area. During his search, Podesta discovered a license plate box which was taped shut. When he opened it, he found an assortment of new parts including a transmission service kit, oil filters, cans of brake and carburetor cleaner, a turn signal switch, and some small PCV valves. Despite the fact that Respondent claims that this cache of parts at Kohler’s station constitutes a violation of its parts policy, this matter was not mentioned to Kohler for approximately 1 month.

After Kohler’s return on October 17, Kohler began wearing a baseball cap with the union insignia on it. On November 8, Preusse approached Kohler and instructed him to come to LoPresti’s office and to bring any person of his choosing. Kohler asked Villa to attend the meeting with him. A woman was present taking notes. LoPresti stated that while Kohler was on disability leave, a box with new parts in it had been found by Kohler’s bench and he wanted an explanation. Kohler testified he did not have an explanation. According to Kohler, he had no explanation because he had not seen the box before. According to LoPresti, Kohler’s explanation shifted but, as to new parts, Kohler explained that sometimes customers brought their own parts and Kohler kept the extra set. Indeed, with regard to the new oil filters, Kohler testified in accordance with LoPresti. Both LoPresti and Kohler were unaware of any customer complaints of being charged for a part which the customer had furnished.

In any event, according to Villa, Preusse, and LoPresti, Kohler admitted that he had more new parts out at his work station. Villa and Kohler gathered these parts and brought them to LoPresti. These included synthetic oil, oil filters, new center caps, hubcaps for a Continental, and a half-quart of oil, as recorded by Preusse. The total retail value of these parts amounted to approximately \$270.²⁵ LoPresti then called in the parts counter employees who explained that they never gave a part to a mechanic without a work order requiring that part. LoPresti formed the conclusion that Kohler had essentially stolen these parts. Kohler testified that he maintained old parts at his work station to teach himself about these parts. LoPresti testified that Kohler had repeatedly requested training.

LoPresti also showed Kohler a work order with various time flags for October 20 on the back. Kohler’s time flag

had been altered. Kohler agreed that the time entry for conclusion of the job, “9.9,” had been changed to “9.5.” The beginning time entry on this time flag was “9.4.” Kohler testified that he told LoPresti that he agreed the entry had been changed while LoPresti testified that Kohler admitted changing the entry. On returning home that evening, Kohler checked his pink copy and it showed “9.9” without alteration. Accordingly, on Kohler’s time records, the job in question, a lube job, required 30 minutes. This was a typical amount of time for such a job for Kohler although at an earlier time he had been performing such work in 18 minutes (0.3) to 24 minutes (0.4). The altered time record indicated the job required only 6 minutes (0.1) to complete. In any event, LoPresti also told Kohler that his efficiency had gone down to 82 or 80 percent and it should be 100 percent. LoPresti stated that he had not yet decided what disciplinary action to take with respect to these problems. Kohler contacted Barbe a few days later about filing a grievance, and told Barbe that he was going to look for another job because he felt his days at Shen were numbered. Kohler also told Barbe he thought the problem was he had been wearing a union hat.

Around lunchtime on Friday, November 11, Kohler was called into LoPresti’s office. LoPresti stated that he wanted a better explanation for where the new parts came from. He told Kohler that if Kohler could provide an explanation, LoPresti would not have to fire him. However, Kohler, knowing that employees were typically fired on Friday, had already examined his paycheck and noted that his accumulated vacation pay was included. He had also noted that his timecard had been removed from the rack where it was ordinarily kept. Both of these indicia indicated to him that he was being discharged. He told LoPresti that he had nothing more to say because he assumed that he was no longer working for the Respondent.

2. Statutory framework

Section 8(a)(1) and (3) of the Act provide:

It shall be an unfair labor practice for an employer—
(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7

. . . .
(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

In *Wright Line*,²⁶ the Board outlined the burden and allocation of proof in cases which turn on the employer’s motivation in taking personnel action against an employee as follows:

First we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a “motivating factor” in the employer’s decision. Once this is established, the burden will shift to the employer to dem-

²⁴ A possible advantage could be gained by an employee in altering a time stamp. For instance, the Respondent’s bonus program was based on employee efficiency. Each job was assigned a standard amount of time. If an employee performed the job more quickly than the standard time, he might receive a bonus.

²⁵ Respondent’s lists of these parts contain values of \$179.30 and \$90.14 for a total of \$269.44. Some of the Respondent’s assigned prices seem to be particularly high including \$9.02 for what appears to be a quart of Mobil-1 oil and \$8 for a pair of wiper blade refills.

²⁶ 251 NLRB 1083, 1089 (1980), *enfd.* on other grounds 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982); *approved in NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

onstrate that the same action would have taken place even in the absence of the protected conduct.

3. Analysis

a. *Suspension*

(1) The General Counsel's prima facie case

Credible evidence indicates that Kohler engaged in protected concerted and union activity by his actions of requesting a pay increase pursuant to the contract and contacting the Union with the Respondents' knowledge. The evidence further indicates antiunion animus based on the independent violations of Section 8(a)(1) and (5) as outlined above as well as LoPresti's statement to Kohler that he knew Kohler had called the Union.²⁷ Moreover, Kohler's suspension for allowing the loaner car to go out with defective brakes occurred 10 days after Kohler was verbally warned about this problem. On the day LoPresti learned of the brake problem, July 19, Kohler was given only a verbal warning. Kohler called the Union on July 28, the day before he was suspended. No explanation was offered for the 10-day delay. Accordingly, I find that the General Counsel has made out a prima facie case that union and/or protected concerted activity was a motivating factor with regard to Kohler's suspension. *Tuskegee Area Transportation System*, 308 NLRB 251, 257 (1992), *enfd.* 5 F.3d 1499 (11th Cir. 1993) (use of a 2-week old customer complaint as grounds for employee's discharge a "classic case of pretext" given the employee's concurrent involvement in union activity and employer's union animus).

(2) The Respondents' rebuttal

The Respondents contend that even if protected conduct was a motivating factor in its decision to suspend, it would have taken the same actions in any event. In particular, Respondents rely on Kohler's gross negligence in missing the fact that "there was no brake pad left on the front brakes of the vehicle" to support its claim that it would have suspended Kohler regardless of his union activity. I find Kohler's testimony that Phil LoPresti both knew about the low brake pads and that Phil LoPresti had the authority to make service decisions about cars in the shop fully credible. This testimony is corroborated by Respondents' evidence that Kohler wrote down that the pads were 10 percent and demonstrates that Respondents nevertheless made the decision to release the car. Kohler's suspension coincided with Kohler's attempt to receive wage increases contained in the union contract and with Kohler's consultation with the Union over this issue. I credit Kohler's testimony that LoPresti mentioned Kohler's call to the Union in the context of his suspension and that LoPresti's discussion of the Kohler's call lasted a significant portion of the suspension meeting.²⁸ Fi-

nally, I note that LoPresti initially issued only a verbal warning over this matter. Only after union activity intervened did he issue the suspension. Therefore, I find that the Respondents have not rebutted the General Counsel's prima facie case by showing that Kohler would have been suspended in any event and, accordingly, I conclude that Kohler's suspension violated Section 8(a)(1) and (3) as alleged.

b. *Discharge*

(1) The General Counsel's prima facie case

The General Counsel has proven that Kohler engaged in protected concerted and union activity in asking for a pay increase pursuant to the contract, calling the Union, and, just prior to the time of his discharge, he was also wearing a union hat. I find that the record demonstrates that the Respondents had knowledge of these activities and that Respondents showed animus toward Kohler's union, protected concerted activities. Just as the timing of the suspension indicated that these activities of Kohler's were a motivating factor, the timing of the discharge is equally suspect because the Respondents learned of the box of parts in October while Kohler was on sick leave. Kohler returned to work on October 17 but was not confronted until November 8. The General Counsel's evidence presents a very strong prima facie case.

(2) Respondents' rebuttal

Respondents argue that Kohler would have been discharged in any event regardless of his union activities because of his alleged theft of parts, alleged alteration of timecards, and alleged poor work performance. Since there is no evidence in the record regarding the Respondents' practices in discharge of other employees, disparate treatment is not at issue. Without any evidence that other employees were not treated similarly, it is impossible to find that Kohler would not have been discharged in any event. Putting aside the work performance and timecard issues, I find that Respondents would have discharged Kohler in any event because of the alleged theft. The evidence reflects that a prounion employee, Podesta, found the sealed box of new parts in Kohler's work area and brought this to management's attention. Kohler himself produced another box of parts. This misappropriation of company inventory constitutes a legitimate reason for discharge despite Kohler's protected activities. Accordingly, I conclude the Respondents have shown that it would have discharged Kohler regardless of his union or protected concerted activities.

The fact that Respondents may have been glad to be presented with the opportunity to discharge Kohler is legally inconsequential. *Klate Holt Co.*, 161 NLRB 1606, 1612 (1966); *P.G. Berland Paint City*, 199 NLRB 927, 927-928 (1972). As the Board explained in *Berland Paint City*:

On the record it is fair to assume that the Respondent entertained a desire to get rid of [the alleged discriminatees], whose union activities it resented, and was pleased to have an opportunity present itself for doing so. But that alone is not enough to establish that

²⁷ I credit Kohler, Barbe, and Morgan over Preusse, LoPresti, and David Wade. This credibility resolution is based on the demeanor of the witnesses, which has been thoroughly discussed, as well as inherent probabilities.

²⁸ In light of this credibility finding, Respondents' argument that there was no evidence presented suggesting "any animus toward Kohler for calling the Union," unduly strains the record. When such a statement is made at the time of an employee disciplinary action, the inference may be drawn that the statement is related to the rea-

sons for discipline. No particular tone of voice or statement evincing animosity is required.

the discharge was in violation of Section 8(a)(3). The mere fact that an employer may want to part company with an employee whose union activities have made him *persona non grata* does not *per se* establish that a subsequent discharge of that employee must be unlawfully discriminatory. If the employee himself obliges his employer by providing a valid independent reason for discharge—i.e., by engaging in conduct for which he would have been discharged anyway—his discharge cannot properly be labeled a pretext and ruled unlawful.

See, also, *Stoutco, Inc.*, 218 NLRB 645, 650–651 (1975); *Soltech, Inc.*, 306 NLRB 269, 277 (1992); and *United Charter Service*, 306 NLRB 150, 164 (1992).

CONCLUSIONS OF LAW

1. By impliedly threatening an employee by telling him he had to choose between the Respondents and the Union but could not remain neutral, promising employees that they would be paid more if the decertified the Union, interrogating employees about union activities in the shop and about a grievance at a prior employer's, assisting employees in their withdrawal of membership from the Union, soliciting employees to sign antionion statements, threatening employees who voted to place pickets at the facility that they would not be working much longer, and creating the impression the union meetings at which such votes were taken were surveilled by the Respondents, the Respondent have engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By suspending Noel Kohler, the Respondents engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

3. By withdrawing recognition from the Union and ceasing payment of employee health and welfare contributions, pension contributions, and supplemental employee disability benefits with bargaining with the Union to a good-faith impasse and without the Union's agreement, the Respondents engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondents have violated Section 8(a)(1) and (3) by suspension of Noel Kohler, the Respondents shall be ordered to rescind the suspension and to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondents shall also be required to expunge from their files any and all references to the unlawful suspension, and to notify Kohler in writing that this has been done.

Additionally, having found that the Respondents violated Section 8(a)(1) and (5) by withdrawing recognition from the Union, it shall be ordered that the Respondents recognize and bargain with the Union in good faith as exclusive representative of employees in the appropriate bargaining unit. Having discontinued payment of employee health and welfare contributions, pension contributions, and supplemental employee disability benefits, the Respondents shall be ordered to pay all such delinquencies from the date of its unlawful action with interest as computed in *New Horizons*, supra.

Having found that the Respondents violated Section 8(a)(1) and (5) by altering terms and conditions of employment without notification to or bargaining with the Union after unlawful withdrawal of recognition, the Respondents shall be ordered to cease such unilateral changes, including paying past due contributions,²⁹ rescinding all unilateral changes, and making whole employees for any losses they have suffered because of the Respondents' unlawful unilateral changes, to be computed as set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest to be computed in the manner prescribed in *New Horizons for the Retarded*, supra, except that any changes in wages, benefits, or other terms and conditions of employment which were unilaterally instituted but are superior to those set forth in the contract shall not be rescinded.

[Recommended Order omitted from publication.]

²⁹To the extent that an employee has made contributions to the pension fund that have been accepted by the fund in lieu of the Respondent's delinquent contributions during the period of non-payment, the Respondent shall reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund. Any additional amounts owed with respect to these fund contributions shall be calculated in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213 (1979). See, e.g., *Sullivan Bros. Printers*, 317 NLRB 561, 566 fn. 16 (1995).